SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 120.

GIOVANNI LAVAGNINO, PLAINTIFF IN ERROR,

vs.

EDMUND H. UHLIG, ALEXANDER McKERNAN, AND THE ST. JOE MINING COMPANY, DEFENDANTS IN ERROR.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

Answering the contention advanced by counsel for defendants in error on page 18 of their brief, to the effect that the offered and excluded proof of the location of the Levi P. and Veta Lode claims by Andrew P. Mayberry, on January 1, 1889, is not material in this case, and the further contention on page 19 of the brief that, the lines of the Uhlig No. 1 and Uhlig No. 2 Lode claims being laid over the Levi P. claim, the area in conflict between said claims would have inured to the benefit of the Uhlig No. 1 and Uhlig No. 2 on abandonment or forfeiture of the Levi P., so as to preclude any rights attaching by reason of the Yes You Do location, we submit the following:

I.

The mere fact that a senior lode location is subject to forfeiture for failure to perform annual work does not give the area in conflict with an overlapping junior location to such junior location without some definite act of relocation.

In *Lindley on Mines* (2d ed.), vol. 1, p. 651, sec. 363, it is said:

> "If B [the senior locator] should ultimately abandon "the location, the conflict area would not fall to D [the "junior locator].
>
> "D [the junior locator] might subsequent to the "abandonment of the conflict area by B [the senior "locator] amend his location and include the over- "lapping surface, but, without some act on his part "manifesting an intention to make a new appropria- "tion or acquire a new right after the abandonment "or forfeiture became effectual, this area would not "by mere gravity become a part of the junior location, "except for the purpose of defining the extralateral "right."

In *Jordan vs. Duke*, 53 Pac., 197, the supreme court of Arizona said (p. 201):

> "There is no such thing as making a location of "ground not open to relocation by reason of being "already located, and then, because of failure on the "part of the owners to support that claim, either by "abandonment or forfeiture, have the location relate "back to the original act. In the location of mining "claims, there is no such thing as relation of acts, ex- "cept such amendments as may take place in support "of an original valid location."

In *Oscamp vs. Crystal River Mining Co.*, 7 C. C. A., 233; 58 Fed. Rep., 293, plaintiff, claiming, under a senior location, the Excelsior claim, brought suit to recover possession of a triangular parcel overlapped by a junior location claimed

by defendants. On trial it was admitted by plaintiff that he had done no assessment-work for the year 1884, but had resumed work in 1885.

On appeal the United States circuit court of appeals for the eighth circuit held that the failure of the owners of the senior location to perform the annual assessment work thereon did not divest the senior locators of title to the area in conflict and vest it in the junior location without some definite act of relocation, the court saying (p. 297):

> "We are unable to see that the defendant company "can acquire a paramount right thereto as against "the owner of the Excelsior claim, except by taking "the same action under existing laws that other per- "sons would be required to take if they desired to "appropriate it as abandoned property."

II.

The alleged discoveries of the Uhlig No. 1 and Uhlig No. 2 lodes being within the prior, subsisting Veta location, the locations based thereon are void.

> "A location based upon a discovery made within "the limits of another existing and valid location is "void."
>
> Lindley on Mines (2d ed., vol. 1, p. 611, sec. 337).

In *Watson vs. Mayberry*, 15 Utah, 265; 49 Pac. Rep., 479, the supreme court of Utah said (p. 482):

> "The location of a mining claim is absolutely void "when its discovery point is within another valid "claim."

And in *Reynolds vs. Pasco*, 24 Utah, 219; 66 Pac. Rep., 1064, the same court said (p. 1065):

> "As said in 1 Lindley Mines, sec. 337, a location "based upon a discovery made within the limits of "another existing and valid location is void."

The same passage from Mr. Lindley's book is quoted and applied by the supreme court of Colorado in *Tuolumne Consolidated Mining Co. vs. Maier*, 134 Cal., 583; 66 Pac. Rep., 863, 864.

In *Erwin vs. Perego*, 35 C. C. A., 482; 93 Fed. Rep., 608, the circuit court of appeals, eighth circuit, in passing upon the respective rights of the litigants to mining ground in Utah thus stated the question presented (p. 611):

> "If the location which Perego made in 1889 be-
> "came valid at any time before October 5, 1895, when
> "the appellant made his discovery, that discovery
> "was not made upon unappropriated public land, and
> "was void."

The same rule was applied in *Crown Point Mining Co. vs. Buck*, 38 C. C. A., 278; 97 Fed. Rep., 462, 465.

This rule has also been uniformly applied by the Land Department.

In *Branagan vs. Dulaney*, 2 L. D., 744, it was held that:

> "A location based upon a discovery made within
> "the limits of another existing and valid location is
> "illegal."

Secretary Teller saying (p. 748):

> "If the locator has the exclusive right of the pos-
> "session and enjoyment how can a prospector go on
> "such claim and make a valid discovery? He can-
> "not become the owner of that portion of the vein or
> "lode discovered within a valid location, because that
> "has been given to the first locator. He has not dis-
> "covered mineral on land belonging to the United
> "States, for while the fee to a valid location may re-
> "main in the United States the exclusive right of oc-
> "cupancy and enjoyment has been given to the loca-
> "tor, and the lands described in such location made in
> "accordance with law, usage and customs, and main-
> "tained by compliance with the laws as to labor
> "thereon, may be considered as certainly segregated
> "from the body of public land, as if a patent had
> "issued therefor."

And in *Winter Lode*, 22 L. D., 362, the Department said (p. 364):

> "The statute itself and all decisions of the Depart-
> "ment and the courts make the discovery of mineral
> "a prerequisite to the location of a mining claim, and
> "the discovery must be upon land open to explora-
> "tion, not claimed or located by any other person."

Lindley on Mines (2d ed.), vol. 1, p. 613, sec. 338:

> "As the discovered lode must lie within the limits
> "of the location which is made by reason of it, if the
> "title to the discovery fails, so must the location
> "which rests upon it."

In *Gwillim vs. Donellan*, 115 U. S., 45, this court said (p. 50):

> "If the title to the discovery fails so must the loca-
> "tion which rests upon it."

Girard vs. Carson, 22 Colo., 345; 44 Pac. Rep., 508:

> "In order that the locator of a mining claim may
> "obtain any right to mining property by virtue of
> "his location, the same must be made upon the un-
> "appropriated lands of the United States."

Respectfully submitted.

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